

Singh (Migration) [2018] AATA 4494 (20 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Sumandeep Singh

CASE NUMBER: 1620202

DIBP REFERENCE(S): CLF2014/28530

MEMBER: Ian Garnham

DATE: 20 September 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations

- 1.
2. Statement made on 20 September 2018 at 5:36pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Partner (Temporary)) visa – genuine relationship – bogus documentation – falsely listed as the father of the sponsor’s child – applicant provides care for sponsor’s child – care and support for each other – difficult financial circumstances – welfare payments do not reflect relationship dates – brief periods of genuine separation – lived together since date of the application – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration made on 11 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 24 February 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because they were not satisfied that, the parties were in a spousal relationship (as defined in the legislation), at the time the application was lodged.
4. The visa applicant appeared before the Tribunal on 18 January 2018 to give evidence and present arguments. The Tribunal also received oral evidence from his wife and sponsor, Meagan Singh.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether; at the time of application, and at the time of decision, the parties are in a spousal relationship as defined in the legislation.
3. Procedural Background:
8. This case has an extensive procedural background of review.
9. The visa applicant first came to Australia from India on a subclass 573 Higher Education Sector visa on 18/08/2007 and has not departed. On 15/03/2010 he lodged a subclass 572 Student visa that was refused on 18/05/2010. From 24/06/2010 to 14/10/2011 the visa applicant did not have a visa. On 13/10/2011 the visa applicant lodged a Protection visa application and it was refused on 22/11/2011. From 20/12/2011 to 24/02/2014 the visa applicant did not have a visa and was again unlawful.
10. On 24/02/2014 the visa applicant lodged a Partner subclass 820/801 visa application and he was granted a subclass 030 Bridging visa with no work rights. On 24/12/2012 this application was refused because; the visa application was found to contain a bogus document, the visa applicant also gave false and misleading information and there were not compassionate and compelling circumstances that affect the interests of an Australian citizen and justified granting of the visa. In addition, the delegate

found that there were not compelling reasons to waive the Schedule 3 requirements and therefore cl.820.211(2)(d)(ii) was not met.

11. The visa applicant sought review of this decision by this tribunal¹ (differently constituted) and on 12 May 2016 the tribunal determined that; Public Interest Criterion (PIC) 4020(1) was not met because the visa applicant had provided information to the Department of Immigration and Border Protection (DIBP) that was false or misleading in a material particular in relation to the visa application, but that there were compassionate and compelling circumstances that affect the interests of Australian citizens that justified granting of the visa. Therefore PIC 4020 (4)(b) was satisfied.

12. The false and misleading information provided to DIBP was that the visa applicant was the father of his sponsor's child, born on 12/04/2012. The visa applicant was named on the Birth Certificate as the father of the child and the parties also made representations that he was the father of the child and they knew this was not the case. The visa applicant and sponsor have long since conceded that he is not the biological father of this child.

13. The tribunal found that the compassionate and compelling circumstances were as follows:

4. The Tribunal notes and gives significant weight to the evidence that the sponsor is due to give birth to a second child and that the oral evidence indicates that the applicant is the biological father. There is evidence before the Tribunal that Ms Dargaville has a history of obstetric complications. There is evidence that she would find it almost impossible in the post natal period to cope with a new baby and her son Marcus without the assistance of the applicant. The Tribunal accepts that the applicant's support at this stage is a significant consideration.

14. In addition, the tribunal found that these same circumstances were compelling reasons for not applying the Schedule 3 criteria and these requirements should be waived. The application was remitted to DIBP on this basis.

15. Following remittal by the tribunal, on 11 November 2016 the delegate again refused the application. They were not satisfied that it was a bona fide spousal relationship:

5. Finally, I note your visa application history and your long multiple periods of unlawfulness before lodging this application, demonstrates a willingness to make all possible attempts and use all possible pathways to remain in Australia. I note the lack of any evidence of the development of your relationship and limited evidence of any spousal commitment, after marrying in July 2013. This, in addition to the evidence provided from Centrelink that contradicts the claims you have made in your application to the Tribunal, fraudulent and misleading information provided in your application and your refusal to provide DNA evidence demonstrating that you are the biological father of your claimed child of the relationship, or convincing evidence to demonstrate parentage; leads me to conclude that your marriage to the sponsor is contrived and that you have entered into this marriage for the sole purpose of obtaining a positive migration outcome.

¹ AAT - 1500452

16. The delegate went on to find that, at the time of application, they were not satisfied that the visa applicant met the requirements of cl.820.211(2)(a).

6. *Claimed relationship background:*

17. In the application the parties claim they met in early 2010 and committed to the relationship on 22/10/2011. The visa applicant claims no previous relationships. The sponsor claims one previous relationship; they married on 10/10/2010 and she claims this relationship ended on 01/01/2011 and they then divorced on 22/06/2013.
18. The parties recall the date of 22/10/2011 is when they began living together because this is the date of the visa applicant's deceased brother's birthday. He died in August of that year. In August 2011 the sponsor had returned to live with her former husband and became pregnant to him in July. The sponsor claims that when she told her former husband about the pregnancy, he told her he was not interested in having the child.
19. The parties claim they discussed the sponsor's situation and agreed they should resume their relationship and the visa applicant would support his sponsor through the pregnancy and act as a father to the child. They claim that they therefore began living together again at the visa applicant's rented house that he shared with his cousin. They originally claimed that they have shared a household ever since this point but eventually agreed there have been periods of separation when the sponsor has returned to live with her mother and sister. These periods are discussed below.

SPOUSE/DE FACTO (cl.820.211(2)(a) and cl.820.221)

Whether the parties are in a spouse or de facto relationship

20. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of the decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australia citizen by birth.²
21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties have provided a copy of a Marriage Certificate that certifies they were married on 20/07/2013.³

² At F: 65 (DIBP)

³ At F: 62 (DIBP)

23. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

7. Financial Aspects of the Relationship:

24. At the hearing the visa applicant claimed that he has not worked since 2010 when he became unlawful. The tribunal considered that this evidence was clearly incorrect based on the banking records, the rental history of the parties, and the 2 pregnancies of the sponsor. Under further questioning on this issue the sponsor admitted that the visa applicant had worked at a Bakery during different periods so that the family could survive.
25. Because the tribunal had no financial information about the family's finances at and around the date of application and the parties had admitted that they did not commence a joint bank account until 2016, the tribunal requested statements of their individual bank statements for the period; June 2013 to December 2014. In response, the parties provided their individual bank statements for the periods; May – August 2013 for the sponsor⁴ and March – September 2013 for the visa applicant⁵. I have noted that these statements do not include the periods relating to; dob-in information received by DIBP indicating the parties have separated since December 2013 and the date of lodgement of the application (February 2014). Nevertheless the visa applicant's statement clearly shows the regular credit of a baker's salary to his account during this period confirming his employment. I have also noted that the visa applicant was the recipient of Family Allowance in August and September 2013 which is a strong indicator that their finances were shared at those times. However their failure to provide the financial information which includes the period of the alleged separation and the lodging of the application supports a conclusion that they were not sharing finances at these key times.
26. DIBP also collected Centrelink information about the sponsor's receipt of payments over the relevant periods. This information shows that during the periods; 17/10/2013 – 18/12/2013 and 13/08/2015 – 06/03/2016, for C purposes the sponsor and visa applicant were separated. The sponsor has admitted to DIBP and the tribunal that she lied to Centrelink; *...to put a roof over her families head*. She also admitted there had been brief periods of genuine separation, when she had returned to live at her mother's house but could not remember the dates. The tribunal accepts that the sponsor may well have provided false information to Centrelink to obtain a higher level of payment to meet family expenses. However, the tribunal is concerned that the earlier of these periods from October 2013 to December 2013 coincides with the date of separation alleged in the dob-in information, and shortly precedes the date of application.
27. The tribunal requested information about the beneficiary to the visa applicant's superannuation and he told the tribunal at the hearing that his brother is the nominated beneficiary of his superannuation policy. Following the hearing the visa applicant changed the beneficiary of the policy; allocating 50% of the benefit to the sponsor and 25% to each of her children. While I acknowledge that this change has now been made, I also acknowledge the change was made after the hearing and has little bearing on my assessment of the parties' financial circumstances at the time of decision and also carries negative weight with respect to their circumstances at the time of application.

⁴ At FF: 203-209 (AAT)

⁵ At FF: 183-189 (AAT)

28. The parties opened and have operated a joint bank account since 2016. They have provided statements for the months of April and December 2016.⁶ These statements show child care payments made by the sponsor's first child's biological father, on-going family assistance and social security payments made to the sponsor and on-going financial activity consistent with their family expenses.
29. With respect to joint assets the sponsor said that they had no assets. After questioning the visa applicant acknowledged that they do own two motor cars and that both are registered in the visa applicant's name. They also gave consistent independent evidence that 1-2 years ago they sold the sponsor's car to the visa applicant's cousin. The 2 cars currently owned by the visa applicant are Holden commodores and the one most recently purchased cost around \$10,000 and that he borrowed the money for this car. At a later stage in the hearing they said that both cars are under finance arrangements and are being paid off at around \$400/month.
30. The visa applicant claimed that he has cumulative debts to his family of \$30,000-\$40,000. He also said he has a credit card debt of \$6,000-\$7,000 that has not been pursued for 4-5 years. The visa applicant said he has no money other than that now held in the joint bank account. The sponsor was unaware of the details of these debts and said that she thought the visa applicant would have failed to fully inform her about them to protect her.
31. Based on the evidence discussed above I am satisfied, that the parties are in significant ongoing debt and difficult financial circumstances as they have stated. I am also satisfied, that for significant periods since late 2011 they have pooled their financial resources. However, based on their failure to provide financial records in the crucial period December 2014 to June 2014 as requested I am not satisfied that they were necessarily pooling financial resources and sharing day-to-day household expenses at the date of application.

8. Nature of the Household:

32. The parties claim that they have always shared household duties and the caring of children. In their various submissions, they have falsely claimed that the visa applicant has not worked at all since he became unlawful in 2010 and therefore he has undertaken the majority of the child care. Despite claims made during the hearing; that the visa applicant had undertaken a significant role in the sponsor's first child's hospitalisation and treatment with respect to incidences of asthma and febrile convulsions, the parties have provided limited information to verify this. Further information on this point, was requested by the tribunal following the hearing (pursuant to s.359AA of the Act), in response the parties provided; medical records for Marcus' presentations and admissions at The Royal Children's Hospital (RCH) in January 2014.⁷ The parties had advised that the hospital records and ambulance notes would acknowledge that the visa applicant cared for Marcus during these periods. The information they have provided does not establish this. However I also acknowledge that the photographic information that has been provided⁸ places the visa applicant with Marcus before, during and after this period. They also claim that the sponsor, her mother and the visa applicant were all trained by RCH to deal with Marcus medical episodes.

⁶ At FF: 67-73 (AAT)

⁷ At FF: 157-172 (AAT)

⁸ At FF: 142-154 (AAT)

33. In addition, the sponsor's mother has provided a statement explaining why the sponsor and Marcus stayed at her house during this period without the visa applicant.⁹
34. The parties claim they began living together in October 2011 when the sponsor moved into the visa applicant's rental share house that he shared with his cousin. The sponsor claims they separated and she moved out around July 2012 for a few months and returned to live with her husband of the time and became pregnant with her first child. She then claims she returned to live with the sponsor when he agreed to support her and the child. The Centrelink address data for the sponsor records her address from November 2011 as 1/101 Merton st which is the address the parties claim they first lived at together, apart from a period of separation when the sponsor returned to her husband,
35. The Centrelink address data for the visa applicant does not begin until August 2013 it demonstrates a common address for both parties until the sponsor only has further addresses recorded for short periods, including her mother's address. Importantly, since 21/01/2014 the parties have shared the same address for Centrelink purposes.
36. Based on all of this information I am satisfied that the visa applicant and his sponsor have, since before the date of application, lived together, and not lived separately and apart on a permanent basis. I am also satisfied that during that time they jointly cared for their 2 young children.

9. *Social aspects of the Relationship:*

37. The parties have provided numerous photographs of themselves with the children and some with other persons as well. They have also included Facebook screen shots of a similar nature. For DIBP they provided various Form 888 Statutory declarations.
38. I am confident that the parties hold themselves out to people as married and that since before the date of application their planning and activities have been jointly undertaken in association with their children.

10. *Parties' commitment to the relationship:*

39. The parties claim this relationship is now over 8 years old, it is over 4 years since the application was lodged and they have had two young children in their care. They have been through 2 difficult pregnancies and had one miscarriage and have had to manage the illness of Marcus as a two year old. He is now 6yo and the baby is 2yo.
40. The parties acknowledge they are in deep financial difficulty and claim they would not have survived without the support of family and friends and each other.
41. I am satisfied that the parties provide each other with companionship and emotional support and that they see the relationship as a long-term one.
42. Overall, I am satisfied that the visa applicant and sponsor, since before the application was lodged, are in a genuine and continuing relationship and are mutually committed to a shared life together to the exclusion of others.
43. On the basis of the above the tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.

⁹ At F: 203 (AAT)

44. The tribunal is also satisfied that, at the time of application, the visa applicant is not prohibited from being the sponsoring partner of the sponsor (cl.820.211(2B)).

45. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

47. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2)(a) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations

Ian Garnham
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).